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SUPREME COURT, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 134

WILLIAM C. GREENE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

JAMES H. HELLER
1926 Woodward Building
Washington 5, D. C.
Attorney for Petitioner

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BRIEF FOR PETITIONER

Opinions Below

The opinions of the United States Court of Appeals for the District of Columbia Circuit are reported at 246 F.2d 677, 100 U.S. App. D.C. 396, and are printed at R. 131-139. There was no opinion by the United States District Court for the District of Columbia.

Jurisdiction

The judgment of the Court of Appeals was entered May 16, 1957. On June 10, 1957, by order of the Chief Justice, petitioner's time for filing his petition for writ of certiorari was extended to and including July 5, 1957. That petition, together with a petition for leave to proceed *in forma*

pauperis, was filed on July 5, 1957, and both petitions were granted June 30, 1958, 357 U.S. 934. The jurisdiction of this Court is based on 28 U.S. 1254(1).

Constitutional Provision, Statutes and Rule Involved[1]

The Fifth Amendment to the United States Constitution, states, in part, that "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . ."

The Narcotic Drugs Import and Export Act, section 2(c), 65 Stat. 767, 21 U.S.C. 174:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence

[1] The texts of the statutes quoted are as of February 10, 1956, the date of the trial court's judgment and commitment (R. 124-125). The citations are to the current U. S. Code.

shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 7237(a) of the Internal Revenue Code, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202 of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The Harrison Anti-Narcotic Act, sections 1, 2 and 9, in part, 68A Stat. 550-551, 860, as amended, 69 Stat. 3, 26 U.S.C. (1954 I.R.C.) 4704(a), 4705(a), and 7237(a):

Sec. 4704(a):

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Sec. 4705(a):

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Sec. 7237(a):

"Whoever commits an offense or conspires to commit an offense described in subpart C of part I, or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subsection, an offender shall

be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subsection or in section 2 (c) of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (a) (1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subsection."

18 U.S.C. 2, 65 Stat. 717:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an

offense against the United States, is punishable as a principal."

Federal Rule of Criminal Procedure No. 35:

"The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

Questions Presented

1. Can a defendant properly be convicted and sentenced, on the basis of exactly the same evidence, under three different provisions of the Federal Narcotics laws, for his part in assisting a single narcotics sale, simply because all three provisions coincidently denounce the sale itself, although they were actually intended to be complementary parts of a Congressional scheme to insure the detection and successful prosecution of all forms of narcotics trafficking and there is substantial evidence that Congress did not intend their cumulative application to a single transaction?

2. Assuming the invalidity of 10 counts, including all 3 consecutive-sentence counts, in the District Court's 15-count judgment, may a federal appellate court properly affirm without opinion the entire judgment and sentence on the theory that the remaining 5 unidentified counts which the appellate court deems valid would support the aggregate sentence already imposed and the trial court would not reduce that sentence even if the 10 invalid counts were actually reversed and the case were remanded for resentencing?

Statement

This case arises from an indictment in 15 counts charging offenses against the federal narcotics laws. Judgment and sentence on all 15 counts was imposed upon petitioner by the United States District Court for the District of Columbia (R. 124-5). On direct appeal the United States Court of Appeals for the District of Columbia Circuit affirmed *per curiam* (R. 131-2), Circuit Judge Bazelon dissenting (R. 132-139). In this Court petitioner attacks the judgment and sentence of the District Court as excessive in law, and he also attacks the action of the Court of Appeals as denying him a full, fair and effective review of the trial court's judgment and sentence.

The Indictment

The indictment (R. 1-9) is at the heart of this case. It is a complex document because of the number and interrelationship of the counts. It charged petitioner and another person named Barbara Floyd with conspiracy (Count 1, R. 1-5) to violate three different federal anti-narcotics statutes—21 U.S.C. 174, 26 U.S.C. 4704(a), and 26 U.S.C. 4705(a)—and with 14 separate substantive violations of the same statutes, as follows (R. 5-9):

21 U.S.C. 174—Counts 2, 3, 6, 9, 12, and 15;

26 U.S.C. 4704(a)—Counts 5, 8, 11, and 14;

26 U.S.C. 4705(a)—Counts 4, 7, 10, and 13.

These 14 counts in turn were based on four separate purchases of heroin capsules from Floyd by Federal Narcotics Bureau Agent Fialkewicz, posing as an addict. All occurred during January, 1955. Count 1 charged conspiracy based on these transactions, and counts 2 and 3 charged a single violation of 21 U.S.C. 174 in each of the first two sales, on January 14 and 18, respectively.

The treatment of the other sales, January 21 and 29, was different, however. In each case Floyd, because of her initial inability to secure all the heroin desired by Fialkewicz, arranged a second meeting at which she delivered the rest of his purchase. The indictment charged three separate crimes (one apiece under the above statutes) *for each delivery*—that is six counts based on each sale, and 12 counts in all.[2]

Purchase of 67 heroin capsules for $100 on Jan. 21, 1955 → Delivery of 30 capsules, Jan. 21, 1955 (R. 5, 6) (Count 4) (26 U.S.C. 4705(a)) (Count 5) (26 U.S.C. 4704(a)) (Count 6) (21 U.S.C. 174)

↓

Delivery of remaining 37 capsules, Jan. 25, 1955 (R. 6, 7) (Count 7) (26 U.S.C. 4705(a)) (Count 8) (26 U.S.C. 4704(a)) (Count 9) (21 U.S.C. 174)

Purchase of 53 heroin capsules for $80 on Jan. 29, 1955 → Delivery of 20 capsules, Jan. 29, 1955 (R. 7, 8) (Count 10) (26 U.S.C. 4705(a)) (Count 11) (26 U.S.C. 4704(a)) (Count 12) (21 U.S.C. 174)

↓

Delivery of remaining 33 capsules, Jan. 30, 1955 (R. 8, 9) (Count 13) (26 U.S.C. 4705(a)) (Count 14) (26 U.S.C. 4704(a)) (Count 15) (21 U.S.C. 174)

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[2] The overt acts in the conspiracy charge (Count 1) reflect the treatment shown in the table. See overt acts 8 to 15 (R. 2-4) and 16 to 21 (R. 4-5).

The Government's Evidence of the Sales

The government's evidence principally consisted of the testimony of Fialkewicz and of Barbara Floyd herself. Prior to petitioner's trial Barbara Floyd had pleaded guilty to the conspiracy charge, count 1 (R. 46, 47), and after trial the remaining 14 counts in her case were dismissed on the motion of the prosecutor (R. 128-130). She testified that she was a narcotic user herself (R. 34), and that when Fialkewicz first approached her posing as an addict she "felt sorry" (R. 45) for him. She said she had turned to petitioner for help in securing the heroin needed by Fialkewicz: "I knew no one that I could purchase it from, that I would go to and purchase it from" (R. 40; see also R. 47). She said petitioner secured the narcotics for her to give to Fialkewicz, and the evidence showed that he drove her to the meetings with Fialkewicz on January 21, 22, 29 and 30 involving the last two sales.

The earlier two sales did not directly implicate petitioner. Floyd first met Fialkewicz in the early evening January 14 when the first transaction occurred. She had dinner with him and another agent, accepted $30 from Fialkewicz, and then left him. Later in the evening she rejoined him and gave him 17 heroin capsules (R. 22-23, 65-66). This is the basis of *count 2*. Again on January 18, Floyd was alone when she met Fialkewicz for a second time. This time they drove together to her house where she accepted $8 from Fialkewicz and went inside. She returned with 4 heroin capsules (R. 23-24, 68). *Count 3* is based on this evidence. Only Floyd's testimony links petitioner, even indirectly, with these two sales. On the first occasion she said she left the agents and went to petitioner's house where she exchanged the money for capsules (R. 22). There is no evidence that petitioner then knew of her purpose, merely Floyd's statements that he had been a friend of hers for

some time and that she knew she could secure narcotics through him (R. 33-34, 40). On January 18 she did not even go to petitioner, but rather to her own home where she got four capsules "that I had had" from petitioner (R. 24).

The pattern of the last two sales was different, however. On January 21 Fialkewicz again sought out Floyd to secure more heroin capsules. He drove her to petitioner's house and gave her $100 for the purchase. She testified that she contacted petitioner and during the day a meeting was arranged with Fialkewicz for that evening. Petitioner drove Floyd to that meeting, as he did to subsequent January meetings with the agent, and she gave the latter 30 capsules, simultaneously arranging a second meeting that night to deliver the rest (R. 24-26, 71). The second meeting was abortive; Floyd testified that petitioner was unable to secure more capsules until the next day (R. 26-28). On the 23rd Fialkewicz came to Floyd's house and picked up from her 37 more capsules to complete the sale. Petitioner evidently was not present at that time (R. 28, 75). On the basis of this transaction, petitioner was convicted of the offenses charged in *counts 4 to 9*.

The last sale, on January 29-30 was similar but compressed in time. On the 29th Fialkewicz called Floyd and set up a meeting with her for that evening to buy more capsules. When they met he gave her $80 and she gave him 20 heroin capsules—all she had with her then—saying that she would deliver more capsules later that night (R. 29-31, 81). The second meeting, at which she gave Fialkewicz 33 capsules, occurred shortly after midnight. Petitioner drove Floyd to both rendezvous (R. 32, 84). He also got the capsules for her. The events of this night formed the basis of *counts 10 to 15*.

Three days later Fialkewicz called petitioner's house to arrange a new purchase with Floyd, but petitioner talked to him and a bit later met him by arrangement at a restaurant. During their conversation, Fialkewicz testified, petitioner referred to Floyd as a woman who "delivered for me" (R. 88) and agreed to secure some heroin for the disguised agent. However, at the appointed time petitioner and another man merely drove by the agreed place and went on (R. 89).

This was the last event, and the only conversation or direct meeting between Fialkewicz and petitioner, before the latter's arrest seven days later on February 9, 1955. At that time petitioner and his house were searched, but neither narcotics nor any of the $218 of marked money which Fialkewicz had used for his purchases was found. In fact, some five government agents, including Fialkewicz, testified about various aspects of the four sales, but none of them ever had any direct dealings with petitioner, except as just indicated, and none of them had observed either narcotics or the marked purchase money in his possession (R. 90-91, 96, 101, 103, 106). Floyd was the sole witness in that respect.

Other Evidence

There was also evidence, admitted over repeated objections by petitioner's counsel (R. 56, 60-61, 107, 122), of an unsuccessful attempt by two other incognito narcotics agents, Kelly and Jackson, in December 1954 to purchase heroin from petitioner for resale, on the pretext of raising bail money for a "mutual" friend who was then in jail (R. 52-64). Floyd was present at two meetings during this time but took no part in the discussions, so far as the evidence showed. Kelly and Jackson testified that the proposed purchase had been agreed to but then fell through because

of petitioner's insistence on payment in advance. The government claimed the relevance of this evidence to the conspiracy charge (count 1), although the 22 "overt acts" were based entirely on the events described above (R. 1-5). The trial judge charged the jury that the Keily-Jackson testimony was introduced "in order to show defendant Greene's knowledge of what was going on" at the time of the January 1955 sales (R. 119).

At the close of evidence petitioner moved for a judgment of acquittal, particularly arguing that there was no evidence of possession to support "several counts" based on 21 U.S.C. 174; but Judge Holtzoff denied the motion, noting that Floyd had testified to the fact of petitioner's possession: "Don't overlook that the witness Floyd was the complete witness here" (R. 107). The charge to the jury followed.

The Charge to the Jury

Certain portions of Judge Holtzoff's charge to the jury are particularly relevant. Before discussing the various counts and statutes involved he stated (R. 114):

> "Narcotics have a recognized, legitimate use in medicine, and of course that use must not be interfered with. On the other hand, the use of narcotics when not under the legitimate supervision of a physician is regarded as dangerous and susceptible of an evil and insidious influence. For this reason traffic in narcotics is regulated by law, in order that narcotics may be obtainable for medicinal purposes under the supervision of a physician, but at the same time in order that they may not be obtainable for illicit and illegitimate uses. Accordingly, sale and purchase of narcotic drugs are permitted only through certain legitimate, recognized channels and only in certain legitimate

ways, under proper governmental supervision. All traffic in narcotics outside of the channels prescribed by law, as I have just indicated, is illicit and is criminal, because of its detrimental effect on the community."

Then he turned to the substantive counts and in summarizing them he read and then briefly discussed each of the three narcotics laws involved. Regarding 21 U.S.C. 174 he said (R. 115):

"In other words, the violation consists in facilitating the concealment and sale of narcotic drug which had been imported into the United States contrary to law, the defendant knowing that it has been so imported.

"The basis of this statute, ladies and gentlemen, is that it is a matter of common knowledge that narcotic drugs are not grown in the United States. The narcotic drugs that are available here are imported from certain foreign countries, and this statute punishes anyone who facilitates the transportation and concealment or sale of any imported narcotic drug, knowing it to be imported contrary to law. And the law proceeds further and provides that the Government does not have to prove every element of the offense enumerated in the statute, but all that the Government has to show is that the defendant had possession of the narcotic drug. The law further provides that such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession of the drug to the satisfaction of the jury.

"In other words, if you find that the defendant had possession of this narcotic drug, in the District of Columbia, then from that fact alone you are at liberty to find the defendant guilty of a violation of the statute, without anything more, unless the defendant either by

himself or by some other witnesses explains the possession of the drug to your satisfaction."

In similar fashion he read, and then explained 26 U.S.C. 4704(a), as follows (R. 117).

"In other words, the violation of the law consists in purchasing or in selling or in distributing a narcotic drug except in the original stamped package or from the original stamped package. The law does not require direct proof of a purchase, sale, dispensing or distribution of a drug. The statute specifically states that the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found. In other words, if it is proven that the defendant had possession of those drugs and that while in his possession there were no appropriate taxpaid stamps on those drugs, these facts constitute prima facie evidence of a violation of the statute and the jury may find the defendant guilty on that charge, if it sees fit to do so, without requiring any further proof."

Finally, near the end of his charge Judge Holtzoff stated (R. 119-120).

"Now, ladies and gentlemen of the jury, there is one other rule of law that is very important. The Government does not have to show that the defendant Greene actually handled the narcotics, or that he actually sold or delivered any of the narcotics. The law is that any person who aids or abets or assists another in committing a criminal offense may be charged himself as a principal in that offense. If several persons act jointly or in concert and each performs a part that results in

the commission of the offense, then all are equally guilty. For example, if a person drives an automobile to the place where the offense is committed, in order to enable the commission of the offense, and he knows the purpose for which he is driving the car, he is guilty of the offense, to the same extent as the person who actually commits the offense. Or if he performs some other part that leads to the commission of the offense by another, he is equally guilty with that other."

The Sentencing

The jury returned a verdict of guilty on all 15 counts, and on February 10, 1954, petitioner appeared before Judge Holtzoff for sentencing. The judge stated (R. 125-6):

"This is a narcotic offense of an exceedingly aggravated character, because apparently this defendant has been dealing in narcotics, in large quantities for a considerable period of time. Some of the counts involve quantities as large as 40 capsules. There are 15 counts in this indictment.

"William C. Greene, it is the judgment of this court that on counts 2, 4 and 7 you be imprisoned in an institution to be designed by the Attorney General of the United States for a term of not less than 20 months and not more than five years, and that you be fined $500.00, the sentences to run consecutively; that on each of the other counts in the indictment you be imprisoned for a term of 20 months to five years and be fined $500.00, the sentences on the other counts to run concurrently with the sentences on counts 2, 4 and 7. In other words, the aggregate sentence is not less than five years and not more than 15 years, and a $1,500.00 fine."

The Appeal

As a result of petitioner's timely application, the United States Court of Appeals for the District of Columbia Circuit granted petitioner leave to appeal to that Court *in forma pauperis* and appointed present counsel to represent him. In his appeal petitioner alleged a number of errors involving the multiplication of counts on the same evidence, erroneous rulings on evidentiary matters, and prejudicial errors in the charge to the jury. However, the Court of Appeals affirmed, 2-1, with a brief *per curiam* statement by the majority (R. 131-2):

> "The record supports at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences. It therefore supports the aggregate sentence. We need not decide whether it supports the 'consecutive' sentences themselves. *Hirabayshi* v. *United States*, 320 U.S. 81, 85; *Wanzer* v. *United States*, 93 U.S. App. D.C. 412, 208 F.2d 45."

Judge Bazelon dissented, setting forth his reasons for concluding that the convictions on some 9 of the 15 counts (counts 1, 2, 3, 7 to 9, and 13 to 15) were invalid (R. 132-8). He noted particularly that the fragmentation of a single sale into two separate deliveries, each made the basis of three new crimes (counts 4 to 15), was forbidden under the "single impulse" test laid down in *Blockburger* v. *United States*, 284 U.S. 299, at 302. See R. 132-135.[3]

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[3] This portion of the *Blockburger* decision is not at issue here. Indeed petitioner relied upon it in the court below, and does so again here, as invalidating counts 7-9 and 13-15.

The *Blockburger* opinion actually contains rulings on two different questions: (1) When a single course of conduct constitutes two *consecutive* crimes, as opposed to one continuous offense, 284 U.S. at 302-303; (2) When the same act constitutes two or more *simultaneous* offenses, as opposed to only one offense, 284 U.S. at 303-304. It is the second ruling which is challenged in Part I of this brief.

He concluded that this error together with the others affecting counts 1, 2, and 3 was prejudicial and therefore the case should be remanded for resentencing on the six surviving counts alone (R. 138-9).

The petitions for writ of certiorari and for leave to proceed *in forma pauperis*, addressed to this Court, were filed July 5, 1957.

Summary of Argument

I.

A. The rule of *Blockburger* v. *United States*, 284 U.S. 299, 304, that a single narcotics sale may be punished under two or more different statutes so long as each statute "requires proof of an additional fact which the other does not" is again at issue here, as it was in *Gore* v. *United States*, 357 U.S. 386. Indeed, the deficiencies of the "different-evidence" rule are much more apparent in this case than they were in *Gore*, for here the entire trial record is before the Court and the rule can be seen in operation. Yet the *Gore* case itself fails to answer other very basic criticisms of the rule as applied in narcotics cases.

B. A number of factors strongly indicate that Congress did not intend multiple prosecution and punishment of narcotics violators. Not only has it provided very severe punishment for any single violation, but it intended uniformity of punishment, a policy which is thwarted if the prosecutor has the choice of seeking one, two or three sentences for nearly identical sales. The rare cases where he does not have this choice under *Blockburger* involve peculiarities of fact or else illicit conduct by persons, such as doctors, who are authorized to dispense drugs. They do not form a pattern of lesser evil, but are merely arbitrary exceptions. From the very beginning in 1909 the ordinary trafficker

could generally be caught and punished under 21 U.S.C. 174; the later laws were merely intended to plug loopholes and particularly to catch licensed dispensers such as doctor.

There is, then at least a choice of inferences available from this history and from the mere fact that a trafficker is equally punishable under each of three complementary laws. The Code arrangement of those laws and the fact that they were separately enacted are inconclusive factors in resolving the basic issue. What seems incomprehensible about the *Gore* decision is that, faced with a choice of inferences and with these major doubts, the majority opinion chose the harsher alternative. Certainly nothing required that notice, and the humane principles of cases like *Bell* v. *United States*, 349 U.S. 81, seem to suggest a contrary result. At the least if Congress desired multiple punishment it could clearly say so, but until it does say so its silence on the question calls for the application of those principles. In fact in two respects this case is more favorable to their application than *Bell* was: there *are* indications in the legislative history that Congress did not desire multiple prosecution; and the added evil arising from the inevitable failure to secure a one-cent tax stamp or a written order for what could not be imported in any event seems far less than the added evil of transporting a second or third woman into white slavery.

At least in each case the question is the judicial one of resolving for or against the accused doubts as to the intent of Congress in the enforcement of penal laws. The doubts are enhanced here, as seen below, by the fact that under *Blockburger* obscure and seemingly irrelevant technicalities become decisive in vital matters of crime and punishment.

C. 1. If the different-evidence rule does apply, it was violated in this case. The statutes which petitioner al-

legedly violated on two separate occasions (26 U.S.C. 4705 (a), 26 U.S.C. 4704(a), and 21 U.S.C. 174) do not require proof of different facts to support each separate conviction. In fact under counts 4-6 and 10-12, respectively, the government relied on identical evidence to convict petitioner of three sale offenses. That evidence showed that on each occasion petitioner had knowingly helped Barbara Floyd secure and deliver heroin to agent Fialkewicz and that he had also briefly had the narcotics in his own possession. Three separate crimes could not be extrapolated from this evidence, however.

2. The aider and abettor rule (18 U.S.C. 2) does not require separate proof that petitioner participated in the violation of each narcotic law. All that need be shown is that petitioner knowingly associated himself with Floyd, who was the real seller (*Nye & Nissen* v. *United States*, 336 U.S. 613) and that was all that was shown. This evidence might support conviction for facilitating concealment and sale (counts 6 and 12) but it did not prove violation of the tax stamp and written order statutes. Even if it did, as it was the same evidence, it could not be used three times over.

3. Since 26 U.S.C. 4705(a) does not authorize conviction based merely on proof of possession of narcotics, such proof, even as a matter of substantive law, could only support two convictions for each sale. Apart from certain differences between the two statutes, it is also clear that proof of the single fact of possession of unstamped narcotics will equally support conviction under 26 U.S.C. 4704(a) and 21 U.S.C. 174. Moreover, the jury was actively encouraged to base its convictions for violations of both statutes on this same fact. However the different-evidence rule forbids that result. See the opinion of Justice Brennan in *Gore* v. *United States*, 357 U.S. at 397-398.

4. These questions were not squarely presented in either *Blockburger* or *Gore*, but they do arise frequently in narcotics cases involving the different-evidence rule. See, e.g. *Harris* v. *United States*, No. 11, O.T. 1958. The narcotics laws do not in fact *require* proof of an additional fact to support conviction under each law. Moreover, in many cases the government does not in fact produce separate proof of each violation. No matter how the test of the rule is phrased, it was not met here. If the test is technical, the government must accept the burden as well as the advantage of its technicalities. It did not sustain that burden here, and therefore it could not secure more than one conviction per sale. That result also fairly reflects the real nature of the evidence against petitioner.

II.

Without discussion of any substantive issues the Court of Appeals for the District of Columbia Circuit affirmed the entire judgment and sentence of the trial court, even though it assumed that 10 of the 15 counts were actually invalid. It relied on the rule of affirmance announced by this Court in *Claassen* v. *United States*, 142 U.S. 140, 146, 147, that the existence of error affecting some counts is immaterial if there are sufficient good counts to support the actual consecutive sentence; "the presumption of law is that the court awarded sentence on the good count(s) only."

At the time *Claassen* was decided there was no valid authority for such a rule in the appellate review of criminal judgments and sentences. The clearest precedent, *O'Connell* v. *Regina*, 11 Clark & F. 155, 8 Eng. Rep. 1061 (H.L. 1844) flatly condemned the rule for reasons which are equally cogent today. The rule is still merely bad "law taken for granted."

1. The presumption underlying the rule is plainly unwarranted. Trial courts *do* err and they do impose judgment and sentence on bad counts or else there would be no reason for courts of error. Here the Court of Appeals assumed that counts 2, 4 and 7 were invalid—at least two of them were clearly shown to be bad—but those were the very counts upon which the consecutive sentence was based. Moreover, as a general matter trial judges do base their overall sentences on the entire judgment, and therefore partly on each count, no matter how the sentence is distributed among the counts. In this case the trial judge clearly indicated that the sentence was partly based on the large number of counts. See, e.g., *Yates* v. *United States*, 355 U.S. 66. Therefore the presumption is "artificial and unjust" (*State* v. *Kaufman*, 18 N.J. 75, 112 A.2d 721) and it results in the affirmance of a judgment which is partly invalid and a sentence which is partly based on invalid considerations. It also effectively deprives the defendant of any real basis for seeking discretionary resentencing under F.R. Crim. P. 35.

2. The *Claassen* rule results in appellate silence and nonadjudication, with the result that really decisive errors may go undiscovered because only an arbitrarily limited part of the record is closely reviewed. Thus the court below specifically declined to consider three of the counts and did not even specify which five counts it believed valid. The rule also has other drastic consequences, for such matters as parole may be materially affected by the number of valid counts. Paradoxically, however, it also leads to appellate resentencing (which is plainly invalid), on the assumption that the same punishment would be imposed even on a severely diminished judgment.

3. The rule is purely a judicial creature. It has been applied by this Court as a matter of discretion. See, e.g.,

Yates v. *United States*, *supra*. It has been criticized and abandoned by the Second Circuit Court of Appeals (*Hines* v. *United States*, 256 F.2d 561), but other courts of appeals generally apply it. It seems to persist largely out of inertia, but the injustice it causes is widespread. Certainly in this case its application deprived appellant of substantial rights and was prejudicial error.

I

Petitioner's Convictions and Sentences Under Counts 4-6 and 10-12 Constituted Invalid Multiple Punishment.

A. Introduction

Petitioner was convicted of 15 crimes, but some 9 of those convictions (counts 1-2, 7-9, 13-15) are clearly invalid for the reasons stated in Judge Bazelon's opinion below, as well as other reasons which might be adduced. There remain counts 4, 5 and 6 based on the January 21, 1955 sale to Fialkewicz, and counts 10, 11 and 12 based on the January 29, 1955 sale to Fialkewicz.[4]

Those counts present a pattern of prosecution and raise, *inter alia*, questions of multiple punishment which were

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[4] As to these counts Judge Bazelon felt bound to affirm on the authority of *Blockburger* v. *United States*, text above. See R. 132, note 1.

The majority opinion in the court below did not pass on the validity of any specific count (although it is inferable that it agreed with Judge Bazelon at least as to the seven concurrent-sentence counts which he would have reversed). That failure raises its own questions discussed in Part II of this brief.

Other reasons supporting the reversal of the nine counts discussed by Judge Bazelon are summarized in note 4 (pp. 7, 8) of the Petition for Certiorari in this case.

first before this Court in the 1932 case of *Blockburger* v. *United States*, 284 U.S. 299. In *Blockburger* there were simultaneous convictions and consecutive sentences under earlier versions of 26 U.S.C. 4704(a) and 4705(a), respectively, based on a single sale of narcotics. The Court affirmed both convictions and sentences, applying the so-called "different-evidence" test (284 U.S. at 304):

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction violates two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Last term in *Gore* v. *United States*, 357 U.S. 386, the Court reaffirmed this holding of *Blockburger* in the face of a square attack upon its statutory and constitutional justification, and on October 13, 1958, it denied rehearing in *Gore*, —— U.S. —— (No. 668, O.T. 1957). The petition in this case made the same attack upon *Blockburger* that Gore did, yet it was granted *without limitation* the very same day that Gore's case was decided adversely to him. Petitioner urges reconsideration of *Gore* and abandonment or at least modification of the *Blockburger* rule. His reasons for doing so are substantially those set forth in the Brief for Petitioner and the dissents (357 U.S. at 392-398) filed in the *Gore* case. Therefore petitioner does not propose to reargue those reasons in full, but merely to summarize them and point out that the majority opinion in *Gore* fails to answer or vitiate them. However, the present case also raises questions concerning the proper scope and application of the *Blockburger* rule, assuming its vitality, and thus demonstrates, more vividly than *Gore*

did, the inadequacies and technicalities inherent in that rule.[5]

B. There Is No Statutory Basis for the Multiple Punishment Petitioner Has Received

The legislative history of the three narcotics laws under which petitioner was convicted was presented to the Court in the *Gore* case briefs. That history, to be sure, reflects a Congressional intent to "turn the screw of the criminal machinery—detection, prosecution and punishment—tighter." *Gore* v. *United States*, 357 U.S. at 390. Specifically, however, it reveals an intent to secure detection and prosecution by the *diversity* of those laws, whereas severe punishment is to be insured by the minimum and maximum sentences applicable under each law *separately*. Moreover, Congress clearly strove to secure uniform punishment for all narcotic offenders, of the same degree. It simply confutes reason to suppose that Congress contemplated the willy-nilly frustration of this careful scheme by permitting prosecutors the choice (or whim) of applying the laws to identical offenders in ones, twos or threes as they saw fit.

However, under the *Blockburger* rule the prosecutor almost invariably has that choice in narcotics cases.[6] Only

[5] *Gore* v. *United States* came to the Court on an abbreviated record as a result of collateral attack under 28 U.S.C. 2255; Gore only attacked the sentences imposed by the trial court. This case arose from a direct appeal on a full record. The convictions, as well as the sentences, are at issue and the entire trial record is open to scrutiny.

[6] Nearly all narcotics in illicit traffic are illegally imported and therefore not tax-stamped. Even if they are domestic products, the defendant's chances of proving that fact are negligible. In prosecuted cases there is virtually never a written order because the nearly invariable means of detection is a feigned purchase by an informer or by a disguised federal agent, as in this case, and

rarely is his ability to treble the counts limited by some quirk of facts or of the statutes themselves. Certainly these exceptions do not fit any clear pattern of lesser criminality. For example, one of a group of defendants may only be chargeable with actual or constructive possession of narcotics and therefore 26 U.S.C. 4705(a), which creates no presumption of guilt based on possession, is not a basis for prosecution. (See, e.g., *Harris* v. *United States*, No. 11, O.T. 1958.) A doctor or a wholesaler may misuse his lawful authority to sell drugs, but the illegal importation and stamp tax laws do not apply to him. (See, e.g., *United States* v. *Doremus*, 249 U.S. 86, and *Direct Sales Co.* v. *United States*, 319 U.S. 703.) A large-scale importer caught at dockside would not be punishable under the stamp tax law, nor would the man who robbed a drugstore. Yet the conduct of these people is fully as heinous as that of the normal trafficker subject to treble punishment.

It is true that there is no evidence of Congressional reaction to multiple punishment, probably because there is no evidence that the practice has ever been clearly brought to the attention of Congress. However, Congress inevitably did know that virtually every narcotics trafficker automatically violates all three provisions at once. See footnote 6, above. It knew this because it knew that the three laws together formed a comprehensive scheme for bringing the trafficker to justice; that all three laws approached the question by indirection in order to avoid then-substantial doubts about the constitutional authority of Congress to punish narcotics sales as such;[7] and that each

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the use of such an order would foil the sale and arrest. Heroin itself, by far the most common illicit drug, is altogether outlawed. It cannot be imported and neither tax stamps nor written orders can be secured for its use. See 21 U.S.C. 173, 18 U.S.C. 1402.

[7] Even as late as 1932, the government brief in the *Blockburger* case (No. 374, O.T. 1931) argued that the laws aimed at violations

law was intended to plug loopholes in the detection and prosecution scheme which were left open by the other two provisions.[8] In this last respect the parallel between those laws and the bank robbery statute considered in *Prince* v. *United States*, 352 U.S. 322, is very strong indeed. Narcotics have been a longer and more elusive federal concern than bank robbery, but the Congressional attempts at solution have been fully as unified in intent.

Differences in the United States Code arrangement or the chronology of enactment of the laws hardly seem decisive in view of these facts. Moreover, with identical intent Congress might alternatively choose to amend a penal law by separate enactment, by additional provision, or by complete republication. In either event it might overlook or fail to comment upon resulting overlaps in coverage. Seemingly, accidental variations of this sort should not govern the important matters of crime and punishment.

Obviously differences do exist between cases of this sort and the "unit of prosecution" cases (*Prince* v. *United States, supra; Bell* v. *United States*, 349 U.S. 81; and *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218). At least two federal courts of appeals have failed to discern any decisive principle in those differences, however. *Gore* v. *United States*, 244 F.2d 763, 767 (C.A.D.C.), and *Yancy* v. *United States*, 252 F.2d 554, 556 (C.A. 6), pet. for cert. pending; see also *Harris* v. *United States*, 248 F.2d 196, 199 (C.A. 8), cert. granted 357 U.S. 935 (No. 11, O.T. 1958). And it is at least clear that such differences

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of specific requirements because Congress did not have the power to punish "sales *qua* sales."

[8] Ironically much of this effort has been directed to policing licensed dispensers—doctors, druggists and the like—rather than the ordinary trafficker, whom the original 1909 act, 35 Stat. 614 (21 U.S.C. 174), covered very effectively. See, e.g., *Nigro* v. *United States*, 276 U.S. 332; *United States* v. *Behrman*, 258 U.S. 280.

as do exist do not inevitably show any factual basis for favoring the man indicted twice under the same act rather than under two different ones. For example, it might be thought a good deal more serious to transport a second woman into white slavery, or to underpay an additional employee for an additional week, than unavoidably to fail to secure a one-cent tax stamp for what could not be legally imported to begin with. At least the factual differences in the first and second type of case are palpable, and are associated with the evil being punished. In the present case, as will be seen below, the factual differences are in the nature of irrelevant technicalities, or at most "merely different labels (for) the same thing" (*Gore* v. *United States*, 357 U.S. at 389).

The "rule of lenity", particularly as stated in *Bell* v. *United States*, *supra*, does not seem to depend upon matters of statutory arrangement; neither does it assume that felons "carefully read the penal code before they embark on crime" (349 U.S. at 84). On the contrary, it appears to rest on the "presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of harsher punishment." (Id., at 83.) The very point at which the "presupposition" becomes decisive, this Court said in *Bell*, is where Congress has failed clearly to indicate its desire for multiple punishment. Certainly there was no such indication in the case of the narcotics laws. Indeed there was much in their history indirectly suggesting an intent *not* to punish under all three laws simultaneously. Clearly, if Congress had in fact correlated all three requirements, now pronounced by separate laws, in a single enactment (see *Gore*, 357 U.S. at 392-393), this Court would have no doubt of its desire to punish traffickers triply. Congress' failure to do such an unmistakable thing, knowing that all three laws were on the books and covered the same traffic, is itself persuasive that it had no such desire.

It does not invite this Court into the field of penology (*Gore*, 357 U.S. at 393) to urge that here, as in the *Bell* case, reasonable doubts should be resolved in favor of lesser punishment of the accused, and to suggest that a rule which arose out of the technicalities of common law criminal pleading as an antidote to equally technical rules for criminal escape (see *Rex* v. *Vandercomb & Abbott*, 2 Leach 708, 168 Eng. Rep. 455 (1796)), is no longer a sound basis for condemning a man to arbitrary and excessive punishment. It seems utterly wrong to act as if our jurisprudence had not passed that era. The different-evidence rule, as will be seen below, depends upon technicalities (and irrelevant technicalities) of evidence which were long ago recognized as inconsequential in civil cases. Lastly, since petitioner does not primarily press the constitutional argument, it seems clear that if Congress did intend such results, it need only say so clearly. Certainly Congress has not done so yet and this Court ought not to presume that it would do so.

C. The Different-Evidence (*Blockburger*) Rule Itself Forbade Multiple Punishment in This Case

On the assumption that the *Blockburger* rule *is* applicable, however, the limitations of that rule were violated in this case.[9] In point of fact the same evidence was relied upon to prove three offenses against petitioner for each sale of narcotics to agent Fialkewicz. Proof of each offense rested on inference and projection from exactly the same core of facts.

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[9] Related questions are presented in other cases to be argued this term: *Ladner* v. *United States*, 355 U.S. 282, petition for rehearing granted 356 U.S. 969 (No. 2, O.T. 1958); *Harris* v. *United States* (No. 11); *Wooday* v. *United States* (No. 135); *Heflin* v. *United States* (No. 137).

Moreover, the statutes relied upon for conviction permit such extrapolated proof. To be sure, each provision of the narcotics laws denounces somewhat different conduct and, of course, it is open to the government to put in explicit proof of each element under each statute. But the statutes do not *require* such strict proof, and what they *require* is the decisive test under the *Blockburger* rule.

More is at issue here than a mere mistaken choice by the prosecution to use available evidentiary shortcuts. For the truth is that the government had no case against petitioner other than that he helped Floyd to get the heroin that Fialkewicz said he desperately needed. Petitioner thereby facilitated two sales in violation of 21 U.S.C. 174 (Counts 6 and 12). Had the government contented itself with prosecution on that basis it would have secured just punishment and it also would have avoided the prohibitions of the *Blockburger* rule.

1. *The Government Relied on the Same Evidence to Prove Three Separate Offenses*

The evidence connecting petitioner with the transactions of January 21 and 29, 1955 has been described in the Statement above, page 10. In essence it showed that on each date Floyd brought petitioner money from Fialkewicz and asked him to secure heroin capsules for the supposed addict; that he went out and later returned with some or all of the requested capsules, turning them over to Floyd; and that on several occasions he then drove her to the rendezvous with Fialkewicz where, out of his presence (R. 45), she delivered the capsules. He was unquestionably aware on these dates that the capsules were going to a third person,[10] although twice previously Floyd had acted entirely on her own, apparently using petitioner as an

[10] He later told Fialkewicz that Floyd had delivered the drugs which he got for the agent. See R. 88.

unwitting source of supply. She said she got the drugs for Fialkewicz because she "felt sorry" for him (R. 45) and certainly petitioner's own motives as a friend of Floyd derived from and paralleled hers. He evidently did not profit from the transactions and in fact it seems clear that he used the purchase money for just that purpose, to buy the capsules from someone else for Fialkewicz.

This evidence might better have supported the view that Floyd and petitioner helped Fialkewicz buy drugs from an unnamed supplier—that they were his *purchasing agents;* but that would have eliminated the counts based on the written order statute, 26 U.S.C. 4705(a). So the government chose to present its evidence to the jury as proof that they themselves sold drugs to Fialkewicz (R. 5-8, 11, 12). Two basic facts, or factual aggregates, constituted the case against petitioner: first that at one time he had the drugs in his possession before giving them to Floyd, and second that, although aware that she was taking the drugs to Fialkewicz, he gave her active assistance. However, he was not the actual seller; Floyd was. He was not present when she met with Fialkewicz and gave him the drugs "not in or from an original stamped package" and "not in pursuance of a written order".

This proof might support one conviction for each sale based either on petitioner's role as an aide and abettor or on his possession of the narcotics. But it did not separately prove three or even two crimes for each sale.

2. *The Aider and Abettor Rule (18 U.S.C. 2) Did Not Require Separate Proof of Each Statutory Offense Charged*

The trial judge's charge on aiding and abetting (a "rule of law that is very important") has been quoted in full above, pages 14, 15 (R. 119-120). He told the jury that

the government did not have to prove that petitioner actually handled or sold or delivered the narcotics, but that anyone who assisted another in committing a criminal offense is guilty as a principal. Thus, he said in a pointed example, driving another person to the place where an offense is committed, knowing the purpose for which the car is being driven, is sufficient for conviction, as is the performance of any other part that leads to the commission of an offense.

This instruction, particularly after the earlier statement that "*all traffic* in narcotics outside of the channels prescribed by law . . . is criminal and illicit (R. 114), completely glossed the fact that the single fact of assistance to Floyd was being claimed as the basis for three separate convictions and sentences. The jury was told that chauffeuring Floyd was sufficient to convict. But chauffeuring is one act, and it does not separately prove sales in violation of three different statutory requirements. Nor does it prove that petitioner actually knew Floyd would sell in violation of the three laws. Perhaps he did know, because the capsules contained heroin (see footnote 6, above), but even that possibility rests on the single fact that heroin was involved.

As applied here and as authoritatively construed, 18 U.S.C. 2, did not require separate proof that petitioner knew of and assisted each violation of each substantive statute. It merely required proof that he had a general "purposive attitude" towards Floyd's illegal venture (*United States* v. *Peoni*, 100 F.2d 401, 402, C.A. 2), or that he consciously shared in her criminal act (*Nye & Nissen* v. *United States*, 336 U.S. 613, 620).

> "In order to aid and abet another to commit a crime, it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as some-

> thing that he wishes to bring about, that he seek by his action to make it succeed.' L. Hand, Jr., in *United States* v. *Peoni* (C.C.A. 2d N.Y.), 100 F.2d 401, 402" (Id., 336 U.S. at 619).

Proof that an accused associated or shared or participated "in some sort" in the criminal act of another does not separately establish his participation in each extrapolated offense. The act-offense dichotomy becomes important under the different-evidence rule. See Kirchheimer, *The Act, the Offence and Double Jeopardy*, 58 Yale L.J. 513 (1949). It is separate proof of each *offense* which the rule requires. See *Blockburger* v. *United States*, 284 U.S. 299, 304.

In a sense the aider and abettor law is merely a rule of the least proof necessary for conviction of a substantive offense, here an offense against the narcotics laws. The same proof cannot be used three times over to triple the conviction, however. Yet the jury was in effect instructed that it could be. Since 21 U.S.C. 174, contains its own aider and abettor rule punishing anyone who "facilitates concealment and sale" of illegally imported narcotics, it seems fair to say that this was the only offense actually shown by petitioner's assistance to Floyd. Certainly there was no separate evidence linking him with her violations of the specific requirements of the other two statutes.

3. *The Government Could Not Base Three Separate Convictions on the Single Fact of Petitioner's Possession of Narcotics*

Two of the three statutes petitioner was charged with violating contain presumption clauses permitting conviction based on proof that the narcotics were in the defendant's possession. Specifically 26 U.S.C. 4704(a) provides that "the absence of appropriate taxpaid stamps from

narcotics drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found", and 21 U.S.C. 174 provides: "Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury." (Section 4705(a) of Title 26 U.S.C. has no similar provision.)

Relying on the above provisions the government introduced proof by Floyd that petitioner had briefly had the heroin capsules in his possession before turning them over to her. The trial judge viewed this evidence as perhaps decisive, for in denying petitioner's motion for acquittal he referred to this aspect of Floyd's testimony and called her "the complete witness here" (R. 107). In his instructions (quoted above, pp. 13, 14) he emphasized the statutory presumptions quoted above and the jury was thus encouraged to treat such proof as conclusive. Presumably any jury seriously attending to those instructions would do just that, in view of the judge's comparatively perfunctory treatment of the fuller elements of proof under each statute (see R. 114-117) and the ambiguities inherent in the government's overall case.

However, unexplained possession of narcotics is not a proper basis for conviction under the written order statute, 26 U.S.C. 4705(a), and therefore would not support conviction under counts 4 and 10 based on that statute. Moreover, it may be doubted whether on the basis of Floyd's testimony that the drugs were in his possession, the presumption clause in 26 U.S.C. 4704(a), authorized petitioner's conviction under counts 5 and 11 for selling drugs to Fialkewicz "not in or from the original stamped package" (R. 6, 7). Certainly he was not the person in whose

possession the capsules were "found" by federal agents.[11] Certainly, too, it is doubtful that the presumption carries so far as to permit a person's conviction, based on past possession alone, for a later sale between two other parties. This Court has held that the validity of such presumptions depends upon a "rational connection between the fact proven and the ultimate fact presumed" (*Yee Hem* v. *United States*, 268 U.S. 178, 183) and it has repeatedly indicated that there are limits to their probative value. See, e.g., *Casey* v. *United States*, 276 U.S. 413, and *Yee Hem* v. *United States*, *supra*, 268 U.S. at 183, quoting *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U.S. 35, 42. See also *Luria* v. *United States*, 231 U.S. 9.

Apart from these differences, however, it is evident that both statutes, 21 U.S.C. 174 and 26 U.S.C. 4705(a), authorize conviction based on the same evidence—proof of possession of unstamped narcotics. This was the very point made by Justice Brennan in his dissent in *Gore* v. *United States*, 357 U.S. 386, 398: "Therefore under the statutes proof of the single fact of possession of unstamped narcotics suffices to convict the defendant of offenses under either §4704(a) or 174." He concluded that the judgment in that case should be reversed under the *Blockburger* rule itself. That position seems unanswerable, for, it bears repeating, the test laid down by *Blockburger* is not what evidence the statutes permit, but what they actually *require* for conviction. Whether or not more than the required minimum is shown to the jury is a question of trial tactics

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[11] Compare *State* v. *Jenkins*, 321 Mo. 1237, 14 S.W. 2d 624; *State* v. *Marshall* (Ohio Mun.), 105 N.E. 2d 891; and *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U.S. 79, construing the word "found" in a venue statute. The language of 21 U.S.C. 174 is significantly different in this respect. Of course, tax stamps can be removed from a package and that fact may account for the requirement that a defendant be actually "*found*" with unstamped drugs in his possession.

and available evidence, not of indispensable proof. However, the result would be the same in either event, for here the Government in fact relied upon this single fact of possession and the jury was in fact instructed that it might convict on that basis alone. (Actually Floyd did not even testify that the drugs lacked stamps at the time they were in petitioner's possession.)

It hardly requires demonstration that the statutory presumptions themselves are not evidence. Rather they "give to the facts from which the presumption is drawn an artificial value to some extent." *Yee Hem* v. *United States*, 268 U.S. 178, 185. They place upon the defendant the burden "of proving facts" to overcome the inferences ("the artificial value") drawn from presumptions themselves. *Casey* v. *United States*, 276 U.S. 413, 418; see also *Roviaro* v. *United States*, 353 U.S. 53, 63. It does not seem necessary to decide whether the two statutes, in view of these clauses, have the relationship of includible offenses subject to merger at the time of judgment and sentence; for it is at all events clear that the same evidence suffices to convict under both.

Accordingly, there was not separate proof to support counts 5 and 11 and none at all to support counts 4 and 10, based on the fact of possession itself. Only counts 6 and 12 were adequately supported by such proof.

4. *If Blockburger Is the Law, It Forbade Multiple Convictions Here*

Questions of proof under the different-evidence rule were dealt with by the Court only summarily in *Blockburger* v. *United States*, 284 U.S. 299 and not all in *Gore* v. *United States*, 357 U.S. 386. In both cases it was contended that the rule itself was bad. Moreover, defendants in those cases were the actual sellers and there was specific proof that

each personally had violated the applicable statutory requirements.[12] That is not the case here, where the government's theory of proof under the companion comes down to "merely different descriptions of the same offense" (*Gore* v. *United States*, 357 U.S. at 392), based on the same evidence. Such proof is common in narcotics cases. See, e.g. *Harris* v. *United States*, No 11, O.T. 1958.

An examination of the narcotics statutes themselves and of the manner in which the government frequently seeks to prove "violations" of their separate "requirements" (*Blockburger* v. *United States*, 284 U.S. at 304) reveals the deficiencies of the different-evidence rule. It can hardly be denied that most illicit dealings in narcotics do in fact offend all three statutory requirements, because neither tax stamps nor licensed written orders are obtainable for contraband drugs. Yet practical probabilities are not substitutes for the proof required of the United States as prosecutor. It must bring home to the defendant by different proof each offense which it charges against him. If it is unable, or fails, to do so, it must content itself with convictions under the basic statute, 21 U.S.C. 174, and accept the normal rule of one punishment for one act having only one evil consequence. In short, it must accept the burden of the different-evidence rule as well as its advantages if it is to rely on that rule. It did not sustain that burden here.

Petitioner's convictions under counts 4, 5, 10, and 11 should be reversed.

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[12] See Brief for Petitioner in the *Gore* case (No. 668, O.T. 1957) pp. 7, 8, and the record in *Blockburger* (No. 374, O.T. 1931) pp. 12-14. In *Blockburger* the trial judge's charge did not even mention the presumption arising from possession of unstamped drugs (R. 30, 31). Nor did this Court's opinion.

Of course, the *Gore* case arose on collateral attack and the evidence and charge to the jury were not directly before the Court.

II

The Court of Appeals Erred in Refusing to Decide the Validity of Petitioner's Convictions and Thereafter to Remand the Case for Resentencing on the Valid Counts Alone.

Independently of the previous contention, there exists a second major error in this case—one that stems directly from the action (or more properly, the non-action) of the Court of Appeals. That court affirmed the entire 15-count judgment and sentence imposed upon petitioner, even though it assumed that no more than some 5 unspecified concurrent-sentence counts were valid.[13] (In what follows petitioner adopts the same assumption, although if his substantive contentions above are correct, the record in fact only supports two counts, nos. 6 and 12.)

The rule relied upon to sanction this result was given its fullest statement by this Court in *Claassen* v. *United States*, 142 U.S. 140, 146, 147, where a general sentence was imposed upon a five-count conviction. The Court held that the first count was valid and that it alone was sufficient to support the judgment and sentence; therefore, it was unnecessary to consider other alleged errors:

> "In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad.' *Peake* v. *Oldham*, Cowp. 275, 276; *Rex* v. *Benfield*, 2 Burr. 980, 985. See also *Grant* v. *Astle*, 2 Dougl. 722,

[13] Specifically the court below held (R. 131-132): "The record supports at least 5 sentences that were to run 'concurrently' the 3 consecutive sentences. It therefore supports the aggregate sentence. We need not decide whether it supports the 'consecutive' sentences themselves. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Wanzer* v. *United States*, 93 U.S. App. D.C. 412, 208 F.2d 45."

730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. *Locke* v. *United States*, 11 U.S. 7 Cranch. 339, 344; *Clifton* v. *United States*, 45 U.S. 4 How. 242, 250; *Snyder* v. *United States*, 112 U.S. 216; *Bond* v. *Dustin*, 112 U.S. 604, 609; 1 Bishop, Crim. Proc. §105; Wharton, Crim. Pl. & Pr. §771."

Since the *Claassen* case this rule has been applied in federal criminal cases virtually automatically. Yet it is an unfair and unsound rule of criminal procedure. Moreover, it seems relevant—albeit not conclusive—to note that at the time of *Claassen* there was no real authority for the rule at all, but merely a series of *dicta* drawn almost entirely from civil cases where utterly different considerations prevailed.[14] The rule is commonly traced to Lord Mansfield, as indi-

[14] Of the three decisions by Lord Mansfield, cited in the *Claassen* opinion, as quoted above, *Peake* v. *Oldham*, Cowp. 275, and *Grant* v. *Astle*, 2 Doug. 722 were civil cases in which precisely the opposite rule prevailed, and his remarks were really a lamentation of that fact. They were dicta twice compounded, therefore, since they had no relevance to the case at bar and they falsely described a rule supposed to obtain in criminal cases. Finally, all three were *nisi prius* cases. See text below.

The four cited earlier decisions by this Court were also civil cases in which the nature of the remedy independently required affirmance even if only one count was valid. *Locke* v. *United States*, 7 Cranch 339, *Clifton* v. *United States*, 4 How. 242, and *Snyder* v. *United States*, 112 U.S. 216, were all actions to condemn or secure forfeiture of particular property. The government alleged alternative grounds for forfeiture, but any one of those grounds would have sufficed. *Bond* v. *Dustin*, 112 U.S. 604 was governed by an Illinois statute specifically requiring affirmance if any one count supported the trial court's judgment.

cated in the *Claassen* opinion, but all three of his decisions on the question were rendered in *nisi prius* courts on motions to arrest judgment. It was therefore timely for Lord Mansfield to notice the errors complained of and restrict the judgment to the good counts alone. The decisions were merely unnecessarily broad statements by the court of its intention to do so. Thus, as Lord Denman said when the question of the rule's validity first came to the House of Lords, "My Lords, this whole doctrine has arisen upon a single remark of Lord Mansfield, twice repeated." (*O'Connell* v. *Regina*, 11 Clark & F. 155, 371, 8 Eng. Rep. 1061, 1143.) The remarks themselves ". . . were needlessly and inconsiderately uttered, hastily adopted, and applied to a stage of proceedings in which they are not correct in point of law." (Id., 11 Clark & F. at 383, 8 Eng. Rep. at 1147.)

The stage "in which they are not correct in point of law" is the appellate stage. When the question first came before the House of Lords, in 1844 (*O'Connell* v. *Regina*, *supra*), Lord Mansfield's views were flatly disapproved for courts of error. Yet 45 years later this court adopted those *dicta* in the *Claassen* case, declining to accept the reasoning and result of *O'Connell* case. That decision deserves reconsideration, for the *Claassen* rule is defective in its rationale, inconsistent in its application, unjust in its operation, and drastic in its consequences for the criminal defendant. Nothing commends it, then, except an unworthy notion of judicial "convenience", and every relevant consideration condemns it as unsound and unfair. Not only *O'Connell* v. *Regina*,[15] but recent American decisions have thoroughly and unanswerably criticized the rule.

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[15] *O'Connell* v. *Regina*, 11 Clark & Finelly 155, 8 Eng. Rep. 1061 (1844), was a review by writ of error of the convictions of the Irish patriot Daniel O'Connell and his associates on 11 counts of seditious conspiracy. Because of the importance of the case, some nine judges were summoned to advise the House of Lords. All nine,

1. *The presumption which underlies the Claassen rule is unwarrantable in fact and in law.* Under the *Claassen* rule, "the presumption of law is that the (trial) court awarded judgment on the good count only" (142 U.S. at 147). That presumption is clearly not warranted here, for the District Court overruled petitioner's motion for judgment of acquittal (R. 107) and it pronounced judgment and sentence on each count separately. It imposed consecutive sentences on three particular counts (Nos. 2, 4, 7), and there is no basis of record for assuming that that arrangement was purely fortuitous. In any event, the court below certainly did not adopt the above presumption, for it actually assumed that all three of those counts might be bad ("We need not decide . . ." R. 131). Judge Bazelon demonstrated that two of them, Nos. 2 and 7, were indeed bad. See R. 132-135, 137-138. Therefore, in this case, as in *O'Connell* v. *Regina*, "(t)his would be to presume what the record negatives" (Lord Cottenham, 11 Clark & F. at 393, 8 Eng. Rep. at 1151).[16]

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plus five Lords "learned in the law", heard lengthy argument, considered the case for two months, and then delivered separate opinions on the question at issue here. All conceded that certain of the counts were defective and also that the question before them had never been decided by a court of error. Neither before nor since that case has the *"Claassen"* rule been given such full and articulate consideration. Very little has been added for or against the rule since the *O'Connell* case.

Seven of the nine judges believed the rule valid; Justice Coltman and Baron Parke disagreed. The House itself disapproved the rule by a vote of 3 to 2, Lords Denman, Coltenham and Campbell constituting the majority. The five opinions of these judges and lords are the ones quoted in this brief, there having been no "opinion of the court", as such.

[16] Speaking of the presumption which the rule requires an appellate court to make, Lord Denman said ". . . I feel an unconquerable repugnance to that; because I cannot be ignorant that I should be setting up a presumption in direct contradiction to notorious fact." 11 Clark & F. at 367, 8 Eng. Rep. at 1141.

Of course, the presumption is unreal in any case. It assumes that the trial judge saw error in the record and disregarded it in his judgment, even though he failed to correct it or note it on the record. If applied generally the reasoning of the rule would dispense with all appellate courts.[17] The doctrine underlying it is, as the Supreme Court of New Jersey said recently "artificial as well as unjust and not consonant with the efforts of our courts to protect the fundamental rights of the accused." *State* v. *Kaufman*, 18 N.J. 75, 82, 112 A. 2d 721, 725.

The court in the *Kaufman* case unanimously disapproved the *Claassen* rule in cases where a general sentence has been imposed, but it added that the problem could be avoided if the trial court sentenced separately on each count (18 N.J. at 83, 112 A. 2d at 725). In fact the problem could be minimized, but separate sentencing does not alter the likelihood that even where such sentences are imposed the actual punishment (consecutive sentences and fines) bears a direct relationship to the overall number of counts of which the defendant stands convicted. The presumption that it does not bear that relationship is, as Lord Denman said, "against the common probability of every case" (11 Clark & F. at 367, 368, 8 Eng. Rep. at 1141). To suppose otherwise would be to contend that the degree and incidence of proven criminality, indeed the very fact of conviction itself, does not affect punishment. On the contrary, those are the first considerations of any sentencing judge. In the present case the trial judge said the case was an "'exceedingly aggra-

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[17] "This reasoning would be quite just if Courts of Law were infallible; but as all writs of error proceed on the ground of the fallibility of human judgment, the presumption that the Court has not committed error is not a safe one to act upon, and may be directly at variance with the fact."

Mr. Justice Coltman in *O'Connell* v. *Regina*, 11 Clark & F. at 271, 8 Eng. Rep. at 1106.

vated one . . . ' There are 15 counts in this indictment" (R. 125). In *Yates* v. *United States*, 356 U.S. 363, 366, this Court said:

> "Reversing a judgment for contempt because of errors of substantive law may naturally call for a reduction of the sentence based on an extent of wrongdoing found unsustainable in law."

In a very real sense, then, every sentence imposed on multiple counts is a general or gross sentence; inevitably the overall actual sentence, however distributed among the counts, is referable to all of them. The *Claassen* rule ignores the possibility that the defendants have been punished "for charges which do not amount to crimes in the eye of the law, and for crimes of which they have not been lawfully convicted" (11 Clark & F. at 413, 8 Eng. Rep. at 1158).

Fundamental as this truth is, it is not the end of the matter, for the rule leads to other injustices.

2. *The Claassen rule results in appellate non-adjudication and yet also in appellate resentencing.* It is ironical at least that the same rule of law should lead an appellate court both to desert its normal duty—review of errors—and to do the very thing most clearly forbidden to it—resentence the appellant. That the *Claassen* case has this twofold effect can be seen from this very case, however.

(a) Clearly the court below did not undertake complete review of this case. It explicitly refused to decide whether or not the record supported the consecutive-sentence counts. Concerning the remaining 12 counts it contented itself with the bare holding that "at least" (R. 131) 5 of them were valid, but it did not specify which 5, and it seems a fair inference that it did not actually determine the validity of the remaining 7 counts. At least it did not say or imply that it did so.

The matter is more than academic. For unless the court reviews the entire case, testing out each conviction in the premise that it may affect the judgment and sentence, the court may overlook errors which so vitiate the entire proceeding as to require reversal. In *O'Connell* v. *Regina,* Lord Denman pointedly noted this possibility that unexplored errors might survive such compartmentalized review. 11 Clark & F. at 376-378, 8 Eng. Rep. at 1144-1145.[18]

The unfairness to the appellant goes further. First, he is deprived of any meaningful opportunity to seek reduction of his sentence under Federal Rule of Criminal Procedure 35. On the record the entire judgment has been affirmed by the appellate court. Yet it may contain serious errors which, if exposed, would warrant discretionary resentencing, even if they did not require outright reversal. The matter may be more serious, however. If petitioner's previous contentions in this brief are correct, only two counts were valid in the entire judgment. However, the trial court imposed consecutive sentences on three counts.

Secondly, those errors, if exposed, might materially affect a defendant's parole chances, his standing in society, and even his punishment in the event that he is subsequently convicted again and sentenced as a repeating offender. It seems merely elementary truth to say that a criminal accused has a right to be adjudged and sentenced on a record free from error. The future consequences of denying him that right may be very palpable.

(b) To hold, as did the court below, that even if 10 of petitioners 15 convictions were invalid his "aggregate sentence" should stand is to engage in appellate resentencing.

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[18] A minor but noteworthy result of such non-adjudication is the very human tendency to try to convert this Court into a general court of error which will review those questions which the court below evidently refused to consider, rather than merely those questions of particular importance warranting review by certiorari.

The Court of Appeals in effect assumed that such errors could not affect the punishment already imposed and therefore affirmed. Yet,

> " . . . it is not for a Court of Errors to enter into any consideration of the effect which such error may have produced. It has no power to alter the sentence, and can form no opinion of the propriety and justice of it from mere inspection of the record, which is all the judicial knowledge it has of the case. Upon what ground is it to be assumed, in any case, that the Court below, if aware of the legal insufficiency of any of the counts, or of the findings upon them, would have awarded the same punishment? In many cases it probably would not do so, but in many it as certainly would not."
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> (Lord Cottenham in *O'Connell* v. *Regina*, 11 Clark & F. at 395, 8 Eng. Rep. at 1151; see also remarks of Baron Parke, 11 Clark & F. at 298-9, 8 Eng. Rep. at 1116, and of Lord Campbell, 11 Clark & F. at 420, 8 Eng. Rep. at 1161).

In *State* v. *Kaufman, supra*, 18 N.J. at 83, 112 A. 2d at 725, the late Chief Justice Vanderbilt of New Jersey noted that affirmance under the *Claassen* rule "in effect . . . would constitute a substitution of the appellate court's decision as to the proper sentence upon the valid count for that of the trial judge in whom such power and duty resides." See also *Commonwealth* v. *Hull*, 296 Mass. 327, 5 N.E. 2d 565, and *State* v. *Hollman*, 232 So. Car. 489, 102 S. E. 2d 873. There is no avoiding that conclusion, for, as pointed out above, even Rule 35, F. R. Crim. P., is realistically unavailable to the defendant if mere affirmance on a subjunctive basis is all he secures.

3. *Claasen is a purely judicial rule. It should be abandoned.* The rule applied by the court below is merely "law

taken for granted" having no basis other than "the mere statement and re-statement of doctrine" (Lord Denman, 11 Clark & F. at 372, 373, 8 Eng. Rep. at 1143). It is bad law based on transparently bad doctrine. It goes squarely contrary to reason and experience, and it is deeply against the grain of our criminal jurisprudence. It resolves substantial doubts arising from the trial court's proceedings against the defendant. It is drastically prejudicial to his rights.

Considering the evils of the rule at least one Circuit Court of Appeals, the Second, has refused to follow the rule even where the trial court imposed separate concurrent sentences on a multiple-count conviction:

> "Obviously the Claassen rule, especially as it applies to cases involving concurrent sentences, presumes that a district judge does and should give the same punishment on one-count convictions as he does on multicount convictions, and that a defendant's punishment is no greater so long as he must stay in prison for the same period of time. The validity of this presumption is questionable. See, e.g., *Yates* v. *United States*, 356 U.S. 363, 78 S.Ct. 766, 2 L.Ed. 2d 837. Moreover, it does not take into account the stigma which attaches to an accused from the conviction of two or more crimes, rather than one, or the practical effect on a prisoner, now that the parole system is so widely applied. In view of these facts we feel constrained to entertain an appeal such as this whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings." (*Hines* v. *United States*, 256 F. 2d 561, 563.)

The *Hines* opinion also noted the fact that this Court has not applied the *Claassen* rule with any consistency. In a series of decisions both this Court and the court below have remanded cases for resentencing on the surviving valid counts alone. *Yates* v. *United States*, 355 U.S. 66; *Nilva* v. *United States*, 352 U.S. 385; *Husty* v. *United States*, 282 U.S. 694; *Putman* v. *United States*, 162 U.S. 687; *Balleu* v. *United States*, 160 U.S. 187; *Washington* v. *United States*, 98 U.S. App. D.C. 100, 232 F. 2d 357; *Nelms* v. *United States*, 94 U.S. App. D.C. 267, 215 F.2d 678; *Fulton* v. *United States*, 45 App. D.C. 27. Yet there is no discernible ground for distinguishing these cases from the far larger group in which the *Claassen* rule is applied.

There have thus arisen two contradictory lines of cases, the minority representing a more sensible and humane rule of appellate action. The *Claassen* rule is not only a judicial creation, it is evidently one of discretionary application. However, unless and until this Court squarely disapproves the rule, in the manner that the New Jersey court did in *State* v. *Kaufman, supra,* it will continue to be applied by the courts of appeals in a large number of cases, with the unjust results shown on the record in this case. Its application to this case was prejudicial error.

Conclusion

The judgment of the Court of Appeals should be reversed.

Petitioner also submits that the District Court's judgment and sentence as to counts 1-5, 7-11, and 13-15 should be reversed and the case should be remanded to that court for resentencing on counts 6 and 12 alone.

In the event that this Court declines to adopt or to consider the contentions in Part I of this brief, the entire case should be remanded to the Court of Appeals with

instructions to reconsider the case and, if it finds error invalidating any count in the District Court's judgment and sentence but not warranting a new trial, to remand the case for resentencing by the District Court on the valid counts alone.

Respectfully submitted,

JAMES H. HELLER
1026 Woodward Building
Washington 5, D. C.
Attorney for Petitioner